

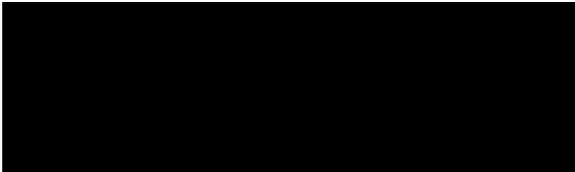


U.S. Citizenship
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Services

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FILE: [Redacted]
EAC 02 199 50588

Office: VERMONT SERVICE CENTER

Date:
AUG 30 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

CC: [Redacted]

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected as untimely filed.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10(a), commonly referred to as Schedule A. The director determined that the petitioner had not established that the beneficiary met the job qualifications on the priority date of the petition and denied the petition accordingly.

On appeal, counsel submitted a copy of a newspaper article concerning U.S. Citizenship and Immigration Services policy and regulation relating to Commission on Graduates of Foreign Nursing Schools (CGFN) certification, and, he requested that the petitioner be given additional time to present evidence of the beneficiary's qualifications.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Furthermore, 8 CFR § 204.5(1)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 20 C.F.R. § 656.10(a)(2) states that, professional nurses are among those qualified for Schedule A designation, if they have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination or hold a full and unrestricted license to practice professional nursing in the state of intended employment.

The regulation at 20 C.F.R. § 656.22(c)(2) states,

An employer seeking a Schedule A labor certification as a professional nurse (§ 656.10(a)(2) of this part) shall file, as part of its labor certification application, documentation that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination; or that the alien holds a full and unrestricted (permanent) license to practice nursing in the State of intended employment.

Eligibility in this matter hinges on the petitioner demonstrating that, on the filing date of the petition, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the petition was filed on May 22, 2002. The Form ETA 750 specifies that the position requires a bachelor's degree in nursing. The petitioner must also demonstrate that, as of the date of filing, the beneficiary possessed the qualifications imposed by the regulations.

Because the evidence submitted did not demonstrate that the beneficiary had the requisite license or certification the Vermont Service Center, requested additional evidence on November 13, 2002. Specifically, the Service Center requested a copy of the beneficiary's CGFNS Certificate or license to practice nursing in the state of intended employment, which is Pennsylvania.

The director determined that the evidence already submitted did not demonstrate the beneficiary's eligibility for the proffered position on the priority date denied the petition on December 9, 2003.

On appeal, counsel requests additional time to " ... [so that the beneficiary may] take and pass the NCLEX-RN examinations to satisfy the requirement of the Department of Labor for issuance of a Schedule A labor certification."¹

The filing date of the appeal was July 1, 2003. It has been over two years since the date of appeal. The petitioner has not submitted evidence that the beneficiary received a CGFNS Certificate or license to practice nursing in the state of intended employment, which is Pennsylvania.

Therefore, the evidence submitted does not demonstrate that the beneficiary was eligible for the proffered position on the filing date. The petition may not be approved.

Further, in order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on May 15, 2003. The director properly gave notice to the petitioner that it had 33 days to file the appeal. Counsel dated the appeal June 20, 2003, Citizenship and Immigration Services (CIS) received the appeal on July 1, 2003, 47 days after the decision was issued. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.

¹ The documentation required is proof that the alien has passed the Commission on Graduates of Foreign Nursing Schools (CGFN) Examination